

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7333

9-376

United States Court of Appeals
For the Second Circuit

Docket No. 76-7333

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *et al.*,
Appellants,

—against—

JAMES DUMPSON, *et al.*,

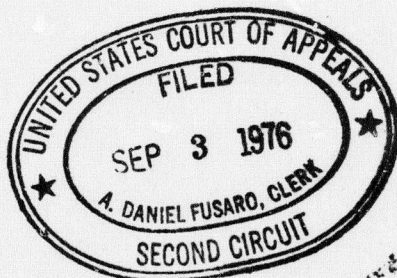
Defendants-Appellees,

NAOMI RODRIGUEZ, *et al.*,

Intervenors-Appellees.

Appeal from the United States District Court for
the Southern District of New York

APPELLANTS' BRIEF



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28 U.S.C. §12913
28 U.S.C. §12533
Rule 17(c), Fed. R. Civ. P.passim
Rule 23(a)(4), Fed R. Civ. P.8,11

MISCELLANEOUS

9 J. Moore, Federal Practice, ¶110.14 [1] at 197
(1975 ed.)3

Wright and Miller, Federal Practice and Procedure,
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Jr

PRELIMINARY STATEMENT

This is an appeal from an order of Judge Robert L. Carter, entered in the Southern District on June 29, 1976, denying appellants' motion for the appointment of substitute or additional counsel to represent the interests of plaintiff foster children in this case. Appellants contend that the district court abused its discretion in permitting the continued representation of plaintiff foster children by appointed counsel committed in her opposition to the decision of a three judge court vindicating the constitutional rights of her clients. Appellants furthermore contend that in basing his decision solely upon the sincerity of appointed counsel's efforts rather than upon her willingness and ability to assert and protect the constitutional rights of plaintiff foster children, Judge Carter misconstrued his responsibility under Rule 17(c), Fed. R. Civ. P., to safeguard the interests of any infant appearing before the court.

QUESTIONS PRESENTED

1. Whether the district court abused its discretion under Rule 17(c), Fed. R. Civ. P., "to make such . . . order as it deems proper for the protection" of any infant appearing before it, when it declined to replace or augment appointed counsel for plaintiff foster children who has refused and is refusing to assert and defend the constitutional rights of her clients as decreed by a three judge court in this case on March 22, 1976?

2. Whether the district court misconstrued its responsibility under Rule 17(c), Fed. R. Civ. P., in basing its decision to deny appellants' motion upon the sincerity of appointed counsel's efforts rather than upon her willingness and ability to assert and defend the constitutional rights of plaintiff foster children as decreed by a three judge court in this case on March 22, 1976?

JURISDICTION

Appellants invoke the jurisdiction of this court pursuant to 28 U.S.C. §1291. Since Judge Carter's post-judgment order of June 29, 1976 marked an end to all proceedings in the district court it is a "final order" within the meaning of that statute. See generally, 9 J. Moore, Federal Practice, ¶110,14[1] at 197 (1975 ed.).

The propriety of this court jurisdiction is not affected by the fact that the order at issue was preceded by a decision of a three judge court on the merits of the case which is presently being appealed to the United States Supreme Court. 28 U.S.C. §1253 authorizes a direct appeal to the Supreme Court "only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement." Stratton v. St. Louis S.R. Co., 282 U.S. 10, 16 (1930). Judge Carter's order plainly falls outside the confines of that narrow category. See Hicks v. Pleasure House, 404 U.S. 1 (1971). Nor can there be any doubt that Judge Carter was correct in deciding by himself the question of whether plaintiff foster children were and are adequately represented in this litigation. See Public Service Commission v. Brashear Freight Line, Inc., 312 U.S. 621, 625 (1941); Bond v. White 508 F.2d 1397,1400-01 (5th Cir. 1975); Hamilton v. Nakai 453 F.2d 152, 160-61 (9th Cir. 1971), cert denied 406 7S 922 (1972)

Accordingly, this court provides the only available forum in which appellants can obtain the review which they seek.

STATEMENT OF THE CASE

This civil rights class action was commenced in May 1974, seeking a declaration that the statutes, regulations and procedures governing the removal of foster children from foster homes in New York State are unconstitutional. The suit was brought on behalf of all foster children and all foster parents within the state who have maintained a foster family relationship for more than one year.*

It is presently the law throughout most of New York State that a local public welfare department or an authorized voluntary child-care agency acting on its behalf may, on ten days notice and without any detailed explanation, remove a foster child from the foster home in which he or she is living. If the foster parents object to the removal they may request an administrative conference during that ten day period. They may not, in preparation for the conference, examine the agency's files even if records contained therein formed the predicate for the agency's decision. Nor may they present or cross-examine witnesses during the conference. The burden is nonetheless on the parents to demonstrate why the agency's plan is not in the best interests of the child. A foster child who wishes to remain with his or her foster parents is without recourse to challenge in advance the agency's decision to separate them.**

*An order so certifying the sub-classes was entered by Judge Carter on March 22, 1976

**During the pendency of this litigation, New York City revised its procedures to provide for a pre-removal hearing upon the request of the foster parents. The amended regulations do not, however, apply if the child is to be returned to his or her biological parents. Nor do they grant the foster child himself any right to object to the agency's plans for his future.

On March 22, 1976, a duly convened three judge court held that the plaintiff foster children were entitled under the due process clause of the Fourteenth Amendment to a pre-removal hearing. The court noted with especial concern the possible traumatizing effect of an ill-conceived and ill-advised decision to sever the bonds of attachment between a child and the foster family with whom he or she has lived for twelve months or longer.

At the same time, the court recognized that any decision regarding a child's placement is necessarily a sensitive one and therefore carefully avoided imposing any "pre-ordained structure" upon the hearing that it required. Rather, it left to the parties themselves the task of evolving procedures suitable to their own professional needs and the right of the child to have his future determined upon the basis of all the relevant information.

Helen Bittenwieser, an attorney who regularly represents the child care agencies whose discretion was at issue in this suit, was appointed by Judge Carter in his capacity as convening judge to represent the interests of the plaintiff foster children. Ms. Bittenwieser has consistently argued against the necessity of any pre-removal hearing. She has, moreover, appealed to the United States Supreme Court to reverse the decision in favor of her clients. The sole issue now before this court is whether, under the anomalous circumstances thus presented, Judge Carter erred in refusing to appoint substitute or additional counsel to articulate and represent the constitutional rights and interests of the plaintiff foster children.

At the time of the filing of the complaint, both the plaintiff foster children and the plaintiff foster parents were represented by attorneys associated with the Children's Rights Project of the New York Civil Liberties Union ("the Project"). The Project represented both sub-classes of plaintiffs because counsel then felt, and still believe, that the interests of foster parents and foster children in the relief sought - the right to a hearing prior to termination of the foster family relationship - did not conflict. However, from the outset there was an understanding between counsel and all named plaintiffs, including the children, that if at any time during the litigation a conflict developed or appeared imminent, or was perceived by the court, the Project would confine its representation to the plaintiff foster children and that the foster parents would obtain independent counsel of their own choosing.

In August, 1974, when all counsel appeared in open court before Judge Carter, the possibility of conflicting interests between the foster children and the foster parents was mentioned by Elliot Hoffman, counsel to the New York City defendants. Although the court did not then appear to share Mr. Hoffman's concern, plaintiffs' counsel promptly informed their clients that the question of separate legal representation had been raised. Once again, there was discussion and a general consensus that should separate representation be required, the Project would appear on behalf of the foster children only.

This agreement between attorney and client was rendered nugatory when Judge Carter, at a pre-trial conference on October 25, 1974, revealed for the first time his misgivings about the Project's

dual representation and announced to all counsel, without prior notice, that he had appointed Helen Battenwieser, Esq., to represent the foster children. Within days, Project counsel submitted to the district court affidavits from each of the named foster parents and one of the plaintiff foster children attesting to their understanding that, given the court's apparent concern, the foster parents would seek alternate counsel while the Project continued to represent the foster children.

Despite the clearly expressed wishes of those most directly involved, Judge Carter formalized his earlier decision to disqualify the Project and appoint Ms. Battenwieser as counsel to the foster children in a letter dated October 29, 1974. This was done sua sponte, without the court's consultation with the plaintiffs, without full inquiry into the likelihood of a conflict of interest developing which might inhibit effective advocacy by either Project counsel or by appointed counsel, and without any finding that the plaintiffs' chosen counsel were incompetent, prejudicial to the plaintiff foster children's case, or in any way in violation of the Canons of the Code of Professional Responsibility.

Anxious to secure the hearing which they had so far been denied, attorneys for the Project, as plaintiffs' chosen counsel, then moved pursuant to Rule 17(c), Fed.R.Civ.P., for an order continuing the Project as counsel to the plaintiff foster children and requiring the plaintiff foster parents to obtain substitute counsel or, in the alternative, for an order appointing Dr. Kenneth Clark as guardian ad litem to seek independent counsel for the plaintiff foster children. In a supporting affidavit, Marcia Robinson Lowry, as Project Director, alerted the court to the fact

that Ms. Battenwieser, whom Judge Carter had appointed to represent the plaintiff foster children, had previously represented major child-care agencies before both legislative committees and judicial tribunals. Ms. Lowry furthermore affirmed that in telephone conversations with Ms. Battenwieser prior to her appointment but after the case was filed, Ms. Battenwieser, in her capacity as a board member of the New York Civil Liberties Union, had expressed doubts as to the necessity for and wisdom of the present lawsuit.

Judge Carter nonetheless adhered to his decision to appoint Ms. Battenwieser as counsel to the plaintiff foster children in an opinion filed on December 11, 1974. In so ruling, Judge Carter noted that "Rules 17(c) and 23(a)(4) [of the Federal Rules of Civil Procedure] provide ample authority for the appointment of separate counsel upon a determination that such appointment is necessary to insure adequate representation for the class of childrer."

Ms. Battenwieser's position throughout this litigation has remained consistent. At each opportunity she has stressed her belief that neither the New York statutes nor regulations nor procedures at issue violate the constitutional rights of plaintiff foster children. On behalf of the plaintiff foster children, she has served an answer to the complaint and filed a memorandum of law arguing that the case raised no constitutionally cognizable claim. When her position was repudiated by the three judge court in a March 22, 1976 opinion written by Judge Lumbard and joined by Judge Carter, Ms. Battenwieser submitted a separate application to the United States Supreme Court for a stay of the judgment, summarizing her views in the following headnote:

"THE IMPOSITION BY THE COURT BELOW OF A REQUIREMENT THAT THE REMOVAL OF A CHILD FROM THE FOSTER HOME IN WHICH HE OR SHE HAS RESIDED A YEAR OR MORE MUST BE PRECEDED BY AN ADVERSARY HEARING IS CONTRARY TO THOSE CHILDREN'S BEST INTEREST, AND A STAY OF SUCH A REQUIREMENT SHOULD BE GRANTED."*

Then, on July 11, 1976, Ms. Battenweiser noted her appeal on the merits to the Supreme Court.

Believing that events had plainly established Ms. Battenweiser's unwillingness to fully and adequately protect the constitutional rights of plaintiff foster children and members of their class, as decreed by the three judge court, Project counsel returned to Judge Carter on May 21, 1976, and moved, again pursuant to Rule 17(c), for the appointment of substitute or addition counsel to speak for the children whose rights have been deemed violated. Judge Carter denied this motion on June 29, 1976, while reiterating his belief that Ms. Battenweiser's view of the merits is "unsound." Judge Carter concluded that since Ms. Battenweiser is "honestly and sincerely performing the responsibilities which were assigned to her," there is "no reason now to replace her or supplement her efforts." This appeal followed.

*The Supreme Court granted a stay of the judgment of the three judge court on May 24, 1976.

ARGUMENT

THE DISTRICT COURT ERRED IN NOT APPOINTING SUBSTITUTE OR ADDITIONAL COUNSEL FOR THE PLAINTIFF FOSTER CHILDREN

Rule 17(c), Fed.R.Civ.P., imposes upon the court an affirmative obligation to insure that the interests of any child appearing before it are fully protected and adequately represented.* See Wright and Miller, Federal Practice and Procedure, §1541 at 638-9 (1971 ed.). Judge Carter's failure in this case to act in accord with that responsibility constitutes reversible error.

As matter now stand, plaintiff foster children and members of their class are represented by an attorney who has succeeded in delaying, and is now endeavoring to reverse, the relief which they were just recently granted. The decision of the three judge court vindicating their constitutional right to a pre-removal hearing is and has been actively opposed by their appointed counsel.

Were plaintiffs adult, there could be little doubt that at leaset some members of their class would, under these circumstances, retain a new lawyer. Being infants, they must instead rely on the court. Rule 17(c) was designed for just such a situation .

Additionally, as representative parties in a class action plaintiff foster children are entitled to counsel "able to assert all the interests of the class." Mersay v. First Republic Corporation of America, 43 F.R.D. 465,470 (S.D.N.Y. 1968), citing Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1971).

*Rule 17(c) reads, in pertinent part: "...The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Judge Carter himself stated in response to appellants' original motion in opposition to Ms. Battenwieser's selection: Rules 17(c) and 23(a)(4) [of the Federal Rules of Civil Procedure] provide ample authority for the appointment of separate counsel upon a determination that such appointment is necessary to insure adequate representation for the class of children."

Yet, in his June 29, 1976 opinion, Judge Carter misconstrued the authority which he had earlier recognized and declined to make any provision for class members whose interests had been accorded constitutional protection by the decision of the three judge court. Acknowledging that he considered Ms. Battenwieser's position on the merits to be unsound, Judge Carter nonetheless continued her as sole representative of the plaintiff foster children and their class on the ground that she had performed with sincerity and honesty the duties assigned to her.

Appellants do not question Ms. Battenwieser's good intentions. But Ms. Battenwieser's good intentions, standing alone, can not and have not guaranteed the plaintiff foster children the determined advocacy in defense of their rights to which they are entitled. The inescapable fact is that despite the best of motivations, "parents, as well as guardians ad litem or persons standing in loco parentis, may at time be acting against the interest of their children," Bartley v. Kremens, 402 F.Supp. 1039, 1047-8 (E.D. Pa. 1975), appeal pending 44 U.S.L.W. 3531, (U.S. March 22, 1976) .

Throughout this litigation Ms. Battenwieser has been guided in her every action by her deeply felt belief in the desirability of the present statutory scheme sanctioning the peremptory removal of a foster child from his or her foster home. The decision of the three judge court has brought into bold relief the conflict between her view and the constitutional rights of the plaintiff foster children.

The case is therefore unique in that it presents in crystallized form a problem which is typically resolved while still inchoate. Other courts, observing even a potential for similar conflict, have not hesitated to exercise their power under Rule 17(c) to appoint additional counsel. The speed and certainty with which they have acted underlines Judge Carter's abuse of discretion in permitting this suit to progress while plaintiff foster children are without the services of a spokesman committed to articulating and defending their due process interest.

In Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973) vacated and remanded on other grounds, 422 U.S. 391 (1975), a group of unwed mothers of illegitimate children filed a class action on behalf of themselves, their children, and all other similarly situated, challenging the constitutionality of a Connecticut law which required disclosure of the child's putative father and institution of a support suit against him as a precondition to receipt of welfare benefits. The court, recognizing that the interests of the mothers were not necessarily congruent with those of the children, named separate counsel, on its own motion, to represent the children. Doe v. Norton, supra, 365 F. Supp. at 69.

Likewise, in Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973), a §1983 action begun by several parents on behalf of their children who were institutionalized in what the complaint alleged to be a constitutionally inadequate state hospital for the mentally retarded, the court stated:

"While the parents in all good conscience may desire one remedy, or a specific type of style of treatment for their children, it would not necessarily be in the best interests of the children. Therefore, it seems to me that a discreet course would be to provide for the appointment of a guardian ad litem, who would not displace the parents as representatives of the plaintiffs but would be alert to recognize potential and actual differences in positions asserted by the parents and positions that need to be asserted on behalf of the plaintiffs. Accordingly, an order shortly will be entered, making the appointment under Rule 17(c), Fed. R. Civ. P., 357 F. Supp. at 74.

Before the decision of the three judge court, appellants proposed to Judge Carter that he name Dr. Kenneth Clark as guardian ad litem to independently evaluate the adequacy of Ms. Battenwieser's representation and, if necessary, to replace her or supplement her efforts. Subsequent to the decision of the three judge court appellants again moved for the appointment of a guardian ad litem to protect the interests of plaintiff foster children. Judge Carter rejected appellants' suggestion each time, although "as a matter of proper procedure, the court should usually appoint a guardian ad litem." Roberts v. Ohio Casualty Insurance Company, 256 F.2d. 35 (5th Cir. 1958). Judge Carter's reluctance to follow this standard course is particularly unexplicable in the wake of the decision of the three judge court and Ms. Battenwieser's manifest disagreement with it. Compare, United States v. Noble, 269 F.

Supp. 814 (E.D.N.Y. 1967).

Even when a guardian ad litem has been appointed, the court's responsibility to any infant party is an ongoing one.

"It is incumbent upon the court so far as practicable to see that the guardian protect the interests of the minor by filing proper pleadings and preparing and presenting a full defense." United States v. E. I. DuPont de Nemours & Co., 13 F.R.D. 98, 105 (N.D. Ill. 1952).

Where, as here, no guardian has been appointed, the court must be especially vigilant in safeguarding the rights of any infant litigant to full and effective representation. "[T]he mere presence of an attorney ... in the action is insufficient of itself to protect [t]he personal interests" of the plaintiff foster children. See Noe v. True, 507 F.2d 9, 12 (6th Cir. 1974).

Judge Carter failed in his June 29, 1976 opinion to even address the one question upon which he should have focused his attention - whether Ms. Battenwieser can provide the class of plaintiff foster children with full and adequate representation. Had he done so, his conclusion that her position on the merits is unsound, and in conflict with the constitutional rights of plaintiff foster children, would have impelled him to appoint additional counsel or, at the least, a guardian ad litem to consider the problem. His oversight has distinctly and obviously prejudiced the plaintiff foster children in the presentation of their case before the Supreme Court. The combined action of Judge Carter and Ms. Battenwieser have left plaintiff foster children in the awkward position of having the sole representative of the class whose constitutional rights have been recognized arguing against the recognition of those rights.

In order to alleviate what Judge Carter himself termed an anomaly, appellants moved to expedite this appeal so that the entire matter could be resolved prior to the filing of papers in the Supreme Court. That motion was denied by Judge Meskill on July 22, 1976. As a result, jurisdictional statements have already been filed by Ms. Bittenwieser and others.

At the least, appellants respectfully suggest that those members of the class of plaintiff foster children who disagree with Ms. Bittenwieser's views be granted separate representation so that their constitutional rights, as declared by the three judge court, may be full represented in any further proceedings in this case.

CONCLUSION

The order of the district court should be reversed and additional counsel appointed to represent the constitutional rights and interests of plaintiff foster children in the present case.

Respectfully submitted

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Attorney for plaintiff-appellant
foster parents

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

ORGANIZATION OF FOSTER FAMILIES FOR :
EQUALITY AND REFORM, et al., 76-7333

Appellants, :

-against- :

JAMES DUMPSON, et al :AFFIDAVIT OF SERVICE

Defendants-Appellees, :

NAOMI RODRIGUES, et al., :

Intervenors-Appellees.:

-----x

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
) ss.:
County of New York)

SUSAN KAYSER being duly sworn, deposes and says that s/he is over the age of eighteen years, is not a party to this action, and resides at 84 Fifth Avenue, New York, New York, 10011, and that on the 3rd day of September , 1976, s/he served the annexed Appellants' Brief and Joint Appendix

upon all attorneys for appellees

by depositing a true copy thereof enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Susan Kayser
SUSAN KAYSER

Sworn to before me this
3rd day of Sept , 1976

Marcia Robinson Lowry
NOTARY PUBLIC

MARCIA ROBINSON LOWRY
Notary Public, State of New York
No. 4227643
County
Commission Expires March 30, 1978

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney

certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation

shows: deponent is

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is

true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says: deponent is in the within action; deponent has read and knows the contents thereof; the same is true to

☐ Individual Verification

the foregoing deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification

the of a corporation, foregoing

in the within action; deponent has read the and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says: deponent is not a party to the action,

is over 18 years of age and resides at

☐ Affidavit of Service By Mail

On 19 deponent served the within upon attorney(s) for in this action, at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Check Applicable Box

☐ Affidavit of Personal Service

On 19 at upon deponent served the within

herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. 76- 3

Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORGANIZATION OF FOSTER FAMILIES
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Appellants,

-against-

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Defendants-Appellees ,

NAOMI RODRIGUEZ, et al.,

Intervenors-Appellees.

APPELLANTS' BRIEF AND
JOINT APPENDIX

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(212) 924-7800

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for